

IN RE CROOKED CEDAR TIMBER SALE

IBLA 84-193

Decided November 5, 1984

Appeals from decisions of District Manager, Medford District, Oregon, Bureau of Land Management, denying protests to proposed timber sale OR 110-TS3-112.

Affirmed.

1. Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Timber Sales -- Rules of Practice: Appeals: Generally -- Timber Sales and Disposals

A party who challenges a decision to sell timber on the ground that timber harvesting will adversely affect water quality, plant and animal life, property values, or the economic stability of surrounding communities must establish the decision to proceed with the timber sale is erroneous.

APPEARANCES: Paula Downing, Legal Committee, Crooked Cedar Committee, Selma, Oregon; Jean Patterson, Legal Committee, Deer Creek Valley National Resources Conservation Association, Selma, Oregon, for appellants; James F. Clason, Acting District Manager, Medford District, Oregon, Bureau of Land Management, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Deer Creek Valley National Resources Conservation Association (Deer Creek) and Citizens Concerned with Crooked Cedar Timber Sale (Citizens) appeal from decisions of the District Manager, Medford District, Oregon, Bureau of Land Management (BLM), dated November 8 and 10, 1983, denying protests of the proposed Crooked Cedar timber sale, tract 83-27, OR 110-TS3-112. The Crooked Cedar tract was offered for sale on September 29, 1983. The prospectus for sale lists 7 units for partial cut and 11 units for clearcut. The sale area is in the Grant's Pass, Oregon, Resource Area, secs. 3, 9, and 11, T. 38 S., R. 7 W., Willamette Meridian. Citizens filed two protests against the sale in September 1983, objecting to clearcutting, herbicide spraying in connection with the sale, and other effects of the sale, alleged to be flooding, soil erosion, damage to fisheries, and alleging that BLM was departing from the Final Josephine Timber Environmental Impact Statement (EIS) and environmental assessment (EA). BLM responded to the protests by decisions dated November 8 and 10, 1983, in which it declined to postpone the sale and denied both Citizens' protests.

Deer Creek also protested the sale, alleging it would cause flooding, soil erosion, and property damage. The Deer Creek protest was denied by a BLM decision dated November 10, 1983, which stated that because the sale embraced 453 acres of Deer Creek watershed representing less than 1 percent of the drainage, no adverse effects on homes or private lands were anticipated. This decision also concluded that all requirements established by law were met by the proposed sale, and denied the Deer Creek protest.

Both Citizens and Deer Creek have filed statements of reasons. They consent to consolidated review of their appeals and now seek, as they did before BLM, a 10-year moratorium on timber sales in the Deer Creek drainage. Citizens argues that the timber sale challenged will, if allowed to proceed, violate provisions of "[t]he National Environmental Policy Act (NEPA), Federal Land Policy and Management Act (FLPMA), Act of August 28, 1937 (O & C Act), the Josephine Master Unit Management Framework Plan (MFP), and the Josephine Final Environmental Statement ten-year Timber Management Plan (EIS)" (Statement of reasons at 1). Citizens contends the timber sale EA is inadequate. Citizens analyzes the provisions of the EIS describing standards for permitting clearcutting and partial cutting of timber on certain types of land, especially land described as low-intensity land and concludes that the Crooked Cedar EA fails to conform to standards established for clearcutting, management of low-intensity management (LIM) lands, partial cutting techniques, and reforestation generally. Specific instances of inadequacy in the EA are not, however, alleged. Citizens goes on to discuss a perceived violation of NEPA, seen to exist in the "deteriorated condition" of Deer Creek, a stream in the same drainage system as the Crooked Cedar sale. Past logging is blamed for the current condition of the stream, which is concluded to be dangerous to those living in the Deer Creek vicinity. Additionally, Citizens challenges the absence from the EA of a detailed discussion of the "no-action alternative" and concludes that such an alternative is the preferred course of action in this case. Treatment by the EA of the topics of timber production capability classification, and impacts of the sale upon fisheries and scenic values are declared to be inadequate.

The Deer Creek statement of reasons repeats arguments made by Citizens concerning violations of statutes and regulations which will occur if the sale is completed, and also argues that the sale is not "cost effective" (Statement of reasons at 1). Deer Creek argues the EA is inadequate because it fails to consider long range damage to fisheries, effects of floods, probable erosion, loss of life, contamination of water sources, and reduced real property values. Based upon a table said to illustrate a partial list of timber sales conducted upon BLM-managed lands, Deer Creek concludes that logging and road building are a primary cause of flooding and soil erosion in the vicinity of Deer Creek and that the Crooked Cedar sale will aggravate an existing bad condition. Arguing that an interdisciplinary analysis is required before further logging should be permitted, Deer Creek concludes such an analysis has not been performed in this case. Deer Creek also concludes that past practices have caused the Deer Creek area to become an "area of critical environmental concern" within the meaning of 43 U.S.C. § 1702(a) (1982).

[1] The analysis offered by both appellants is based upon a conclusion, not supported by evidence in the record on appeal or offered to be proven,

to the effect that logging the Crooked Cedar sale will cause flooding, soil erosion, and result in loss of timber producing capability. Although both appealing parties cite instances of past flooding and soil erosion, there is no proof in the record to link past experience to the proposed sale or to show that the sale in some important way lacks adequate planning to prevent such occurrences in the future. Deer Creek argues, for example, that a severe flood will soon occur because there has been no such flood for sometime, and because of logging road construction in "headwall areas" and "steep side canyons" (Statement of reasons at 14). There is, however, nothing in the record to indicate that such construction as will occur on the proposed sale has not been adequately planned so as to prevent or minimize erosion. The EA discusses this problem and establishes criteria for roadbuilding in those areas where steep slopes cannot be avoided by the roadbuilder.

It is apparent from the filings made by appellants in this matter that they consider BLM to be under a responsibility to disprove the allegations raised by them. See Rebuttal at 2. The arguments made and issues sought to be raised in this appeal are quite similar to those described by In re Lick Gulch Timber Sale, 72 IBLA 261, 90 I.D. 189 (1983). In that case, where a timber sale was also challenged on the ground that the timber sale would affect water quality and the economic life of nearby communities, it was established that the burden to prove that BLM's decision was in error was upon the party opposing the sale. Id. at 292, 299, 306, 90 I.D. at 207, 210, 214. In this case the Departmental precedent established by In re Lick Gulch Timber Sale, supra, is controlling. The case made by appellants must be examined in the light of the findings of that decision.

The issues appellants wish to raise may be grouped for convenience into three categories: (1) Statutory violations and related legal questions seen to exist in regulatory applications of statute and preparation of the EIS and EA, (2) issues relating to forest regeneration, and (3) damage to the watershed.

The first-stated objections raised by appellants are an attempt to establish violations of the Act of August 28, 1937 (O & C Act), 43 U.S.C. § 1181a (1982), and violations of numerous statutes dealing with environmental concerns and conservation of natural resources. Appellants have not, however, offered any evidence establishing a causal link between past injury to the watershed and the forest and current proposed BLM practices on the Crooked Cedar sale. Moreover, there is no apparent link between any provision of law relied upon by appellants and any proposed action in the Crooked Cedar sale which tends to show that the sale or any proposed action in connection with the sale violates any law, regulation, or the EIS or EA which are here under attack. Appellants do not point to any specific provision of any statute as relating directly to their arguments, with the exception of 43 U.S.C. § 1702(a) (1982). This provision, however, merely defines a term, "areas of critical environmental concern." In this instance, as they do generally in their statements of reasons, appellants assume that they have established a sufficient case by stating an assertion concerning their ultimate conclusion. This is not enough. They have not shown that their valley is in any way endangered by the Crooked Cedar sale proposal merely by asserting that it has,

for reasons yet to be explained, come to be, in the opinion of appellants, an area of critical environmental concern. ^{1/}

Primary reliance is placed upon NEPA, 42 U.S.C. §§ 4321-4370 (1982), which appellants contend is violated by the decision to sell Crooked Cedar timber. They argue, as did the appellant in the Lick Gulch decision, that the EIS and EA used to prepare the Crooked Cedar sale are inadequate because they have permitted a sale to take place. Since appellants conclude this will inevitably lead to flooding, erosion, water degradation, and loss of life, they argue that NEPA must have been violated by the agency. This is simply not correct as a matter of law or logic. Examination of the EA reveals a detailed assessment of the effects of the proposed sale, including the effects of the clearcut portion of the project. Referring to the specifications for the sale, a considered analysis is given by the EA concerning the effect of logging upon air, soils, watershed, vegetation, and wildlife. As this Board observed in Lick Gulch, concerning similar arguments apparently made based upon NEPA, "it is clear that all environmental considerations have been exhaustively explored. NEPA requires no more." Id. at 310, 90 I.D. at 216.

Concerning the issue of forest regeneration, Citizens questions whether data can be provided to indicate that reforestation can be achieved. Citizens alleges that, according to personal surveys by its members of area timber sales during the last several years, many planted trees are dying. BLM responds that its stocking survey records of 1980 to 1982 indicate stocking at or above target levels on 83 percent of clearcut and 63 percent of partial cut. "Stocking" is an expression of the number of uniformly spaced, suitable trees per acre. According to BLM, 1983 data indicates better than 83 percent regeneration success for all clearcuts. BLM refers to several independent reports as supporting its conclusion that it can anticipate successful regeneration of the units embraced by the sale. One of these, referred to as the Minore Report, was discussed at some length in Lick Gulch. The Minore Report offers a scientific basis for anticipating regeneration in either clearcut or partial cut areas. The statistics cited by BLM exceed the level established by the Minore Report as the minimum necessary to justify clearcutting. Another Board decision involving a timber sale, In re Otter Slide Timber Sale, 75 IBLA 380 (1983), observed in a similar case, where an appellant's numerous general assertions of error were answered in specific detail by BLM, that mere disagreement with the decision and the analysis provided by BLM are not enough to establish BLM was in error in deciding as it did.

That this Board has been diligent in analyzing and evaluating statistical data presented by both parties is amply evidenced by the Lick Gulch decision. Here, however, there is no evidence offered by appellants to compare to the showing provided by BLM. The relief sought by appellants cannot, therefore, be granted. See In re Bald Point Timber Sale, 80 IBLA 304 (1984).

^{1/} In any event, determinations of what areas are properly classified as areas of critical environmental concern are not subject to review by this Board. See In re Lick Gulch Timber Sale, supra at 317 n.44, 90 I.D. at 220 n.44.

Finally, so far as concerns the claimed damage to the watershed which might be expected from the Crooked Cedar sale, both Citizens and Deer Creek contend the sale is in violation of NEPA, the EIS, the MFP, and the EA because cumulative impacts of the sale on the Deer Creek drainage were not considered.

Again, this claim is not supported in the record.

As was said in In re Otter Slide Timber Sale, *supra*, the numerous objections raised by appellants (which, in this subject area, include water quality, fisheries, aesthetic and economic objections) are fully answered by the BLM response, which deals in detail with the nonspecific objections raised by appellants. Since BLM now proposes to conduct a review of the EIS, however, it appears that some of the relief sought by appellants in this appeal may be obtained through this review process. (See notice of intent to supplement the Josephine and Jackson Klamath EIS, 49 FR 23708 (June 17, 1984).) This review will, at any rate, offer appellants additional opportunity to participate in the policymaking process, and to develop specific objections to actions proposed to be included in the area's timber sales.

Appellants' requests for hearing must be denied, because, upon the record which they present for review, there is no foundation upon which to order a hearing. A hearing is properly ordered only where there are material issues of fact which require the full development of an evidentiary record. In this proceeding appellants have relied primarily upon attacks against data compiled by BLM in preparation for the Crooked Cedar sale and upon personal observation of apparently unrelated events in the Deer Creek valley to support their requests for a logging moratorium. This record, however, tends to support the sale decision rather than indicate it should not be completed. Nothing in the record now before the Board suggests that an evidentiary hearing would produce evidence to show that the sale is in violation of the law. Consequently, a hearing is not appropriate. See, e.g., Alumina Development Corporation of Utah, 77 IBLA 366 (1983). To the extent arguments or motions raised by any party have not been specifically addressed by this opinion, those arguments or motions have been considered and are rejected or denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Franklin D. Arness
Administrative Judge

We concur:

James L. Burski
Administrative Judge

R. W. Mullen
Administrative Judge

